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Intermountain Farmers Association v. Jim Fitzgerald : Brief in Support of Respondent's Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT FOR THE STATE OF UTAH

INTERMOUNTAIN FARMERS ASSOCIATION,

Plaintiff & Appellant,

v.

JIM FITZGERALD,

Defendant & Respondent.

BRIEF IN SUPPORT OF
RESPONDENT'S PETITION
FOR REHEARING

Appeal from a Judgment of the
District Court of Salt Lake County
Honorable Gordon R. Hall

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IN THE SUPREME COURT FOR THE STATE OF UTAH

INTERMOUNTAIN FARMERS ASSOCIATION,	)	
Plaintiff & Appellant,	)	
v.	)	CASE NO. 14723
JIM FITZGERALD,	)	
Defendant & Respondent.	)	

BRIEF IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING

Appeal from a Judgment of the Third Judicial District Court of Salt Lake County
Honorable Gordon R. Hall, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

INTERMOUNTAIN FARMERS ASSOCIATION, a Utah corporation,

Plaintiff and Appellant,

-vs-

JIM FITZGERALD,

Defendant and Respondent.

Supreme Court No. 14723

BRIEF IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a money judgment in favor of defendant and respondent ("defendant" herein) on his counterclaim. Plaintiff and appellant ("plaintiff" herein) sued to recover $41,625.00, interest, and reasonable attorney's fees it claimed the defendant owed on an open account for feed (R.7). Defendant filed a counterclaim for injuries and death sustained by his dairy cows alleging that the injuries to and the death of defendant's cows and resulting damages to the defendant were caused by the feed purchased by defendant from plaintiff. During two separate periods of time, defendant purchased and fed to his dairy cows dairy feed

manufactured by plaintiff. Defendant claimed that during both periods of time and due to the negligence of plaintiff, the dairy feed was deficient in usable protein, inconsistent in usable protein, contaminated by diethylstilbestrol, and contained excess urea and that this negligence caused defendant's dairy animals to be in poor health or die or produce less milk resulting in a loss to the defendant of $498,633.11. In addition, defendant claimed $100,000 for punitive damages (R. 23-38 and Ab. 39).

DISPOSITION OF CASE BY LOWER COURT

After a nine-day jury trial during which over 150 exhibits were received in evidence, the jury returned a verdict on special interrogatories in favor of plaintiff on its complaint in the amount of $44,175.00 and in favor of defendant on his counterclaim in the amount of $226,330.57. No punitive damages were awarded (R. 140). The judgment on jury verdict was entered by the Honorable Gordon R. Hall on May 19, 1976 (R. 141). Thereafter, plaintiff filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial (R. 148). These motions were denied by the trial court.

RELIEF SOUGHT ON APPEAL

Plaintiff sought an order reversing the judgment in favor of defendant on the counterclaim as a matter of law. In the alternative, plaintiff sought a new trial.

ACTION TAKEN BY APPELLATE COURT

The Supreme Court reversed the jury verdict and dismissed defendant's counterclaim as a matter of law. It is from this ruling that defendant seeks a rehearing.

LEGAL ARGUMENT

POINT I. SUFFICIENT GROUNDS ARE PRESENT FOR A REHEARING TO BE GRANTED

Rehearing should be granted herein inasmuch as good and sufficient grounds exist under Rule 76(e) of the Utah Rules of Civil Procedure and the cases interpreting this rule. Rehearing should be granted for the following reasons:

A. The court's decision in the instant case fails to correctly state the law (see Point VIII at page 24 and Point IX at page 35).

B. The court misconstrued and overlooked material facts (see Point IV at page 6, Point V at page 9, and Point VI at page 15).

C. The court overlooked decisions which affect the result of the case (see Point VII at page 19). The court failed to consider many material points and erred in its conclusions (see Point X at page 40 and Point III at page 5).

That these reasons are sufficient grounds for granting a rehearing, see Brown v. Richard, 4 Utah 292, 11 Pac. 512 (1886); Beaver County v. Home Indemnity Co., 88

Utah 1, 52 P.2d 435 (1935); and Cummings v. Nielson, 42 Utah 157, 129 Pac. 169 (1913).

POINT II: THIS COURT ERRED BY INVADING THE PROVINCE OF THE JURY

This court has long held to the rule that where there is competent evidence to support the jury verdict, the appellate court is not permitted to substitute its belief for the belief of the jury. Uinta Pipeline Corp. v. White Superior Co., 546 P.2d 885 (1976); Charlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176 (1961); DeVas v. Noble, 13 Utah 2d 133, 369 P.2d 290 (1962).

Contrary to the foregoing, this court substituted its belief for that of the jury despite ample, competent evidence contained in the record to support the jury verdict.

Evidence upon which the jury based its finding that the plaintiff manufactured and distributed feed in a careless and negligent manner is found throughout the entire record but has been crystalized at Point IV on page 6 hereof.

Evidence upon which the jury based its finding of proximate cause is likewise found throughout the entire record. However, a ~~poparri~~ potpourri of this evidence is set forth at Point V on page 9 herein.

Likewise as to the damages, ample, competent evidence exists to support the jury verdict as is summarized at Point VI of page 16 herein.

POINT III: THIS COURT OVERLOOKED THE FACT THAT ALL 32% PELLETS WERE MANUFACTURED AT PLAINTIFF'S DRAPER PLANT, A MATERIAL FACT

In the opinion of this court, Judge Palmer wrote that this court could find no direct evidence of plaintiff's feed being harmful since none of the tests as to the toxicity or existence of urea in the feed were from plaintiff's Spanish Fork plant, where defendant purchased 14% dairy feed. The court overlooked and/or disregarded the most important evidence in this case, which is that 14% dairy feed contains rolled corn, rolled barley, other natural foods, and a 32% pellet manufactured only at plaintiff's Draper plant (Ab. 7 and 73). The 32% pellets were then shipped to plaintiff's other plants, where they were mixed with rolled corn, rolled barley, and other natural foods to make 14% dairy feed (Ab. 6 and 7). Therefore, regardless of the plant from which the feed sample of 14% dairy feed was taken, all of the 32% pellets in that feed were manufactured at plaintiff's Draper plant. If that pellet was deficient in protein or contained excess urea, the 14% dairy feed mixed by the individual plant would contain either a deficiency of protein or an excess of urea. Because of the centralization of manufacture of the pellet, all feed sample reports are material if they are samples of a 32% pellet, 14% dairy feed, or 14% beef cattle supplement, regardless of

the plant from which the sample was taken. Unless there is a clear understanding of this concept, it would appear to the uneducated eye that samples taken from plants other than Spanish Fork are immaterial and incompetent evidence. However, it is clear that all samples are relevant and material, regardless of the plant from which they were taken, if the feed sampled was manufactured by plaintiff during the periods defendant purchased plaintiff's feed. For this reason, exhibits cannot be declared incompetent if the feed tested was from other than from plaintiff's Spanish Fork plant.

POINT IV: THE COURT MISCONSTRUED AND OVERLOOKED FACTS SHOWING THAT PLAINTIFF MANUFACTURED AND DISTRIBUTED FEED IN A CARELESS AND NEGLIGENT MANNER

Negligence is a jury question unless all reasonable men must draw the same conclusion from the facts present. Singleton v. Alexander, 19 Utah 2d 292, 431 P.2d 126 (1967). If there is substantial evidence to support the jury's verdict, that verdict cannot be set aside by the reviewing court. The following evidence clearly shows that reasonable men could conclude that plaintiff negligently manufactured and distributed feed during the periods of use by defendant:

A. Defendant ordered 14% dairy feed from plaintiff, but plaintiff shipped to defendant 14% beef cattle feed (Ab. 36, 37, and 38).

B. Plaintiff's Spanish Fork plant sold a lot of beef cattle feed and only had one bin for pellets so plaintiff granted permission to use beef cattle pellets in the dairy feed mixed by the Spanish Fork plant, where defendant bought feed (Ab. 27 and 28).

C. Mr. Loveless, the manager of plaintiff's Spanish Fork plant, knew that 32% cattle supplement pellets were prepared for beef cattle feed but, in spite thereof, he used those pellets in 14% dairy feed (Ab. 26 and 27).

D. Exhibits 5, 6, 7, 87, 88, and 90 show that during the first period of use by defendant of plaintiff's 14% dairy feed, 32% cattle supplement pellets manufactured by plaintiff contained diethylstilbestrol (Ab. 29).

E. The testimony of Mr. Loveless shows that plaintiff was aware that diethylstilbestrol is a birth control item, that a dairyman would not want to have a birth control substance in dairy feed, and that he could not explain how diethylstilbestrol got in the 32% cattle supplement pellets (Ab. 39).

F. Exhibits 2, 106, 107, 117, 130 (No. 71-1415), 87, 109, and 96, lab reports from the State of Utah Chemist, and Exhibit 79, a lab analysis prepared by Woodson-Tenant Laboratories, show that during the periods defendant purchased 14% dairy feed from plaintiff, plaintiff produced and sold dairy feed that contained less crude protein than was guaranteed by the feed label.

G. Exhibits 116, 130 (No. 71-9876), and 130 (No. 71-9067), lab reports from the State of Utah Chemist, show that during the periods defendant purchased 14% dairy feed from plaintiff, plaintiff produced and sold dairy feed that contained more protein equivalent from non-protein nitrogen than was guaranteed by the feed label.

H. Exhibit 149, comprising chemical reports of analysis numbers 70-5204, 70-6721, and 70-7280, shows that plaintiff's employees knew prior to February of 1971 that plaintiff produced and sold dairy feed containing less crude protein than was guaranteed on the feed label and dairy feed containing more protein equivalent from non-protein nitrogen than was guaranteed on the label. This exhibit also shows that prior to February of 1971 plaintiff's 32% cattle supplement pellets contained diethylstilbestrol [Exhibit 14 (No. 70-7280)]. In spite of this knowledge, plaintiff did absolutely nothing to correct the problem.

I. The testimony of Mr. Loveless, Mr. Olafsson, who was in charge of plaintiff's feed formulations, and Mr. Turley, manager of plaintiff's Draper plant, shows that plaintiff did not have any in-house chemical analysis facilities at Draper, Spanish Fork, or any other plant to analyze the feed it produced to ensure the feed met the guarantee on the label (Ab. 29, 37, and 74).

J. The testimony of Mr. Loveless, Mr. Olafsson, and Mr. Turley shows that plaintiff relied upon the State of

Utah, Department of Agriculture, Office of State Chemist, to conduct all tests (Ab. 74, 29, and 37).

K. The testimony of Mr. Turley shows that by the time plaintiff received reports from the Utah State Chemist, all feed covered by the report had been sold and delivered by plaintiff to its customers (Ab. 74).

L. Mr. Olafsson testified that the employee of plaintiff who mixed the 14% dairy feed tested by the State Chemist on August 15, 1974 (see Exhibit 12), made a mistake (Ab. 29).

M. Mr. Turley testifed that the employee of plaintiff who mixed the 32% cattle supplement pellets shown in Exhibit 128 made two mistakes, the first when he put the component ingredients together and the second when he added urea to that mixture (Ab. 77).

N. Mr. Turley testified that he would not have allowed the 32% supplement shown in Exhibit 123 to be sent out had he known it contained 39% protein (Ab. 29).

This evidence shows that there is substantial evidence in the record to support the jury's finding that plaintiff was negligent in its preparation and distribution of feed; therefore, the jury's finding of negligence should not be disturbed by this court.

POINT V: THIS COURT MISCONSTRUED AND OVERLOOKED FACTS SHOWING THAT CONSUMPTION OF PLAINTIFF'S FEED BY DEFENDANT'S COWS CAUSED DEATHS AND LOSS OF MILK PRODUCTION

As to the proximate cause issue, the standard is to view the evidence of proximate cause in the light most favorable to the verdict to determine if substantial evidence was presented to support the verdict of the jury. This court, in its written opinion, states that there is no evidence in the record to justify a conclusion that the feed caused the death, diminished milk production, or any other damage to defendant's cattle. Again, this court misconstrued, overlooked, and/or disregarded the following competent evidence:

A. The testimony of the defendant shows that prior to consuming plaintiff's 14% dairy feed, defendant's dairy cows were fat, their hair was slick and shiny, they looked good, and they were in very good physical condition (Ab. 140).

B. The testimony of defendant shows that after defendant's cows consumed plaintiff's 14% dairy feed they lost weight, acted sick, had droopy, dull, and sunken eyes, walked as if in pain, and their hair stood up and was lusterless on the ends (Ab. 140).

C. The testimony of defendant shows that prior to consuming plaintiff's 14% dairy feed, the herd average milk production was 44 pounds per head per day (Ab. 140).

D. The testimony of defendant shows that after consuming plaintiff's 14% dairy feed, milk production decreased to 37 pounds per head per day (Ab. 106 and Exhibits 106 and 20 through 54, inclusive).

E. The testimony of defendant, supported by Dairy Herd Improvement Association (DHIA) records, shows that after consuming plaintiff's 14% dairy feed, defendant's cows died of bloat, suffered stress from bloat, and could not become pregnant (Exhibits 17 through 56, inclusive).

F. The testimony of defendant shows that these same cows gained weight, stopped bloating, increased their milk production, and looked better during the period of nonuse of plaintiff's 14% dairy feed (Ab. 141).

G. The testimony of defendant, Dallas Shermer, Harvey Cook, and Curtis Solomon, supported by DHIA records, shows that these same cows again lost weight, began to bloat, and had a decrease of milk production during the second period of use by defendant of plaintiff's 14% dairy feed (Ab. 40, 41, 85, 89, and 142 and Exhibits 17 through 56, inclusive).

H. Defendant's testimony, supported by DHIA records, shows that after defendant ceased using plaintiff's 14% dairy feed the last time, bloat ceased and milk production increased (Ab. 145).

I. The testimony of defendant shows that his dairy cows have eaten the same alfalfa and corn silage since 1970, have consumed the same water, have been milked by the same milkers and milking equipment, and have been housed in the same barn and manger since 1972 (Ab. 131, 133, and 134).

J. The testimony of defendant shows that after he stopped feeding his cows plaintiff's 14% dairy feed the last time, the cows did not bloat again until Grow Best Feed Company furnished feed containing excess urea (Ab. 145).

K. The testimony of Ed Aragon, an experienced milker who worked for defendant during the periods defendant's cows ate plaintiff's feed, shows that he milked, fed, and cared for defendant's cows consistently and to the best of his ability and, in spite thereof, milk production dropped, cows bloated, and the general health of the herd deteriorated (Ab. 67).

L. Plaintiff knew that a dairy cow that calves once a year produces significantly more milk than a cow that is milked continuously (Ab. 106). In spite of this, plaintiff put diethylstilbestrol (a birth control substance) in its 32% cattle supplement pellets and allowed the Spanish Fork plant to use these pellets in 14% dairy feed (Ab. 37 and 38).

M. Dr. Roper, the veterinarian for defendant's herd, observed the herd during the second period the cows ate plaintiff's 14% dairy feed. He suspected that the cows were suffering from urea toxicity but dismissed the possibility because of the quality control facilities he assumed plaintiff utilized (Ab. 62).

N. During both periods of time during which defendant's cows ate plaintiff's 14% dairy feed, Mr. Aragon

and Dallas Shermer, milkers, observed uncoordination, slobbering, uneasiness, dullness, regurgitation, convulsions, bloat, abdominal bleeding, and death among defendant's dairy animals (Ab. 69 and 85).

O. The testimony of Dr. Robert Gardner, a professor of Dairy Science at Brigham Young University, shows that symptoms of urea toxicity in dairy cows include uncoordination, slobbering, uneasiness, dullness, regurgitation, convulsions, bloat, abdominal bleeding, and death (Ab. 96 and 97).

P. The testimony of defendant and Curtis Solomon, John Ladin, Sherman Babcock, and Dr. Gardner shows that chemical analyses were run on defendant's corn silage, alfalfa, and water (Exhibits 79, 80, 82, and 83), and each was found to be within normal limits (Ab. 48, 42, 50, and 109).

Q. The testimony of defendant shows that his cows weighed an average of 1,300 pounds and consumed an average of 32 pounds of 14% dairy feed per day during the times material to this case (Ab. 160).

R. The testimony of Dr. Gardner shows that, in his opinion, a 1,300 pound cow would show signs of toxicity by daily consumption of .57 pounds or more of urea per day (Ab. 96).

S. The testimony of Dr. Gardner shows that, in his opinion, a 1,300 pound dairy cow would suffer a decrease

in milk production by a daily consumption by .40 pounds of urea per day (Ab. 100).

T. The testimony of Mr. Olafsson shows that during the period of time material to this case the plaintiff mixed 300 or 350 pounds of either 32% dairy concentrate pellets or 32% cattle supplement pellets with other ingredients to produce one ton of 14% dairy feed (Ab. 4).

U. Exhibits 12, 103, and 116 are reports of analyses on feed produced by plaintiff during the period of use by defendant of plaintiff's 14% dairy feed.

V. The testimony of Dr. Gardner shows that, in his opinion, if 300 pounds of 32% cattle supplement shown on Exhibit 116 were used to make 14% dairy feed and the 14% dairy feed was consumed by a 1,300 pound cow at the rate of 32 pounds per day, the cow would receive .56 pounds of urea per day, which would decrease milk production (Ab. 98 and 100).

W. The testimony of Dr. Gardner shows that, in his opinion, if 32 pounds of the 14% dairy feed shown on Exhibit 103 were fed to a dairy cow on February 4, 1972, and 32 pounds of the 14% dairy feed shown on Exhibit 99 were fed to a dairy cow on February 7, 1972, and 32 pounds of the 14% dairy feed shown on Exhibit 96 were fed to a dairy cow on February 10, 1972, and 32 pounds of the 14% dairy feed shown on Exhibit 98 were fed to a dairy cow on February 11, 1972, the cow would suffer chronic effects from urea and a decline in milk production would occur (Ab. 103 and 104).

X. The testimony of Dr. Gardner shows that, in his opinion, bloat caused by excess urea consumption is a dry bloat, and bloat caused by green chopped hay is a frothy bloat (Ab. 108).

Y. The testimony of defendant and Dallas Shermer shows that the bloat suffered by defendant's cows during the period they consumed 14% dairy feed manufactured and sold by plaintiff was dry bloat (Ab. 84).

Z. The testimony of Dr. Gardner shows that, in his opinion, the decline in defendant's milk production as shown on the DHIA records was not caused by weather, hoof trimming, sickness, or any other usual cause of milk production variations (Ab. 107).

AA. The testimony of Dr. Gardner shows that, in his opinion based upon reasonable scientific probability, the death of defendant's cows due to bloat, the decline in milk production of defendant's dairy herd, and the retardation in reproduction among defendant's dairy cows during the periods the dairy cows consumed plaintiff's 14% dairy feed were caused by the consumption of inconsistent amounts of protein and excessive amounts of urea (Ab. 107).

The foregoing evidence supports the jury's finding of proximate cause; therefore, this finding should be upheld.

POINT VI: THIS COURT COMPLETELY OVERLOOKED THE DAIRY HERD IMPROVEMENT ASSOCIATION RECORDS

Exhibits 17 through 56, inclusive, comprised Dairy Herd Improvement Association (DHIA) records. These records clearly support the jury's award of damages to defendant and should not be ignored by the reviewing court. Each exhibit consists of eight separate, computerized information sheets arranged in a meaningful manner to assist the dairy farmer. The information comprising the computerized information sheets is assembled by the DHIA, a national organization that at least once a month tests dairy animals owned by defendant and other of its members. The first sheets, white with blue shading, are the barn sheets, which list by number each cow in the herd in milk on the day of the tests. These sheets show how many pounds of milk each cow gave on the day of the tests and the percentage of butterfat contained in the milk given. The sheets show the number of days each cow has been milked since she calved and the date she was last bred. These sheets also indicate cows that died during the month as well as those cows that were sold during the month for beef.

The second series of sheets are individual cow records. They are green and white and show the pounds of milk produced by the cow daily, the percentage of butterfat in the milk given, the number of days the cow has been

milked since she calved, the number of pounds of milk produced during each lactation, and her standing in the herd based upon her milk production. In addition, these sheets show the number of days each cow is dry and the number of days each cow is milked during each lactation of her productive years. These figures allow the defendant to compare milk production for each year and specifically whether each cow produced more or less milk when being fed plaintiff's 14% feed.

The third category of sheets is the monthly herd summary. They are blue and show the monthly herd average in milk production, the number of cows in milk, the number of cows dry, the lactation average, the number of cows that died during the month, the number of cows sold during the month for beef, the average amount of grain fed during the month, the number of cows that gave birth to calves during the month, the number of cows that have gone over 75 days without becoming pregnant, and the number of cows expecting calves.

The fourth category of records is the monthly cow listing. This is the green computer printout that shows the date each cow was bred, the pounds of milk given daily, the percentage of milk production increased or decreased, the grain required for each cow based upon her level of production, the number of days each cow carried a calf, the number of lactations, the number of days in milk for each lactation,

the total milk produced in each lactation, the total butterfat produced in each lactation, whether the cow died or was sold for beef, whether she could not get pregnant, and whether she aborted.

These DHIA records, which are very accurate, comprehensive, and reliable, together with defendant's tax returns and barn sheets, support his testimony that during periods of use of plaintiff's 14% feed, 42 cows died of bloat. Based upon the replacement cost of these cows, defendant testified that he lost $33,812.00 as a result of these deaths (Ab. 145, 146, and 147).

The DHIA records and defendant's barn sheets support his testimony that during periods of use of plaintiff's 14% feed, cows suffered stress from bloat and as a result were nonproductive. These cows were culled from the herd and sold for beef. The defendant testified that the difference between the value of the cow as a high milk producer and the value of the cow for beef represented the loss sustained by him which he testified was $63,400.00 (Ab. 188, 189, 190. 191, and 192).

The DHIA records supported defendant's testimony that during periods of use of plaintiff's 14% feed, 60 cows could not get pregnant, thereby causing their milk production to decrease. Defendant testified that he was damaged in the amount of the cost to maintain these 60 cows beyond the 305 days each cow was in milk. These losses totalled $56,332.60 (Ab. 187 and 188).

The DHIA records supported defendant's testimony that as a result of the use of plaintiff's 14% feed, defendant's cows suffered from stress caused by bloat resulting in a decline of milk production. The losses claimed were identified by year, month, and amount and were supported by the DHIA records above described (Exhibits 17 through 56, inclusive). These losses totalled $125,867.79 (Ab. 147, 148, and 149).

The DHIA records support defendant's testimony that during periods of use of plaintiff's 14% dairy feed he had to buy medication, hire extra men, and purchase semen to artificially inseminate cows that could not become pregnant. These expenses, supported by return checks, totalled $20,000 (Ab. 192 and 193).

This evidence clearly shows that substantial and sufficient evidence is established by the record to support the jury's award to defendant of $226,330.57.

POINT VII: THIS COURT OVERLOOKED AND DISREGARDED PREVIOUS FEED CASE DECISIONS WHICH AFFECT THE RESULT OF THE INSTANT CASE

The contention of defendant that the evidence produced at trial was sufficient to sustain a jury verdict is supported by the decision in Farmers Grain Cooperative v. Fredricks, 7 Utah 2d 180, 321 P.2d 926 (1958). In that case, the grain cooperative sued to foreclose a note and

mortgage executed by a turkey grower to secure advances of feed. The turkey grower counterclaimed for breach of warranty and negligence, claiming nutritional deficiency in the feed purchased by him from the cooperative. The jury returned a verdict for the grower on his counterclaim, and the cooperative appealed. Justice Worthen, writing for the court, held that evidence was sufficient to justify the inference that the feed was deficient and that such deficiency proximately caused the grower's damage.

The evidence at that trial was only testimony as to the condition of the poults prior to the time they ate the feed in question, the conditions under which they were raised, the nutritional condition of the flock, and the symptoms the birds exhibited.

No analysis was ever made at any time of any of the feed.

The evidence showed that after using the feed of the cooperative, abnormal death losses occurred in the flock which was diagnosed by the head of the Department of Veterinary Science at Utah State University. Thereafter, no analysis was made of any of the birds that died or did not gain weight.

The evidence upon which the grower relied for his claim was:

1. Testimony that the turkey grower's flock had cankerous mouths and dry feathers, which indicated the turkeys were not getting the required nutrition.

2. Testimony that birds that suffer from malnutrition will be slowed down in their growth and will need more food to reach prime condition.

3. Testimony that a turkey weakened by malnutrition will be undersized and will not mature rapidly nor put on as much weight as turkeys that have not been so weakened.

4. Testimony of turkey growers who did not use the cooperative's feed that turkeys raised by them were in better condition than the turkeys raised by the turkey grower.

Based upon this testimony, the Supreme Court of Utah was of the opinion that:

> ...there was ample competent evidence to justify the inference by the jury that the feed was deficient and proximately caused the defendant's damage. This court has held that the question of proximate cause is a jury question. (p. 929)

A similar factual situation existed in Park v. Moorman Mfg. Co., 121 Utah 339, 241 P.2d 914 (1952). Park brought an action against Moorman for breach of warranty as to fitness for Park's purpose of poultry feed concentrate. The jury verdict was in Park's favor, and Moorman appealed claiming that there was insufficient evidence to justify the inference that Park's loss was the proximate result of the use of either the feed produced by Moorman or the method of feeding propounded by Moorman.

To support his claim, Park relied upon the following:

1. Testimony by Moorman's veterinarian that the feed or the feed plan could have caused Park's loss.

2. Other poultry growers testified that they used the feed and had undesirable results.

3. Testimony that Park's chickens were far below other chickens on the plan and that such condition came within a significant period after Moorman's feed and plan were adopted.

4. Testimony that there were no harmful substances in the feed and that the feed contained all the substances purportedly contained in it.

5. Park had fed the hens in accordance with Moorman's instructions, and the death and loss of production was the result of Moorman's "self-feeding system."

The Supreme Court of Utah, Justice McDonough writing for the court, ruled as follows:

> Appellant further contends that the evidence in this case is insufficient to justify the inference that plaintiff's loss was the proximate result of the use of either the feed or the methods of feeding or both. The record contains testimony of defendant's own veterinarian that the feed or plan could have caused plaintiff's loss. There was further testimony of other witnesses who had used the feed and had undesirable results. The inferences drawn by officers of defendant company and by buyers from plaintiff that the chickens on defendant's feed and plan were far below the other chickens on the other plan and that such condition came within a significant period after defendant's

> feed and plan were adopted is further evidence of proximate cause. This question of proximate cause is likewise a jury question. Taking the evidence most favorable to the plaintiff, there is substantial evidence established by the record to support the jury's implied finding as to proximate cause of the loss. (p. 920)

In the Farmers Grain case, supra, testimony was produced to show that turkeys raised by other growers were in better condition than those raised by the turkey grower. The defendant in the instant case produced even more convincing evidence because in his herd were cows that would not eat plaintiff's 14% dairy feed. All cows were on the same farm, were milked by the same milkers, were kept in the same barn. All ate the same food and drank the same water. The only difference was that some of defendant's cows refused to consume plaintiff's 14% dairy feed.

One cow that would not eat plaintiff's 14% dairy feed was "Midge." Defendant's testimony (Ab. 158 and 159) supported by the DHIA individual cow record on Midge, part of Exhibit 19, shows that while milk production of cows that ate plaintiff's 14% dairy feed was erratic, the milk production of Midge followed a normal lactation to production ratio (Tr. 1092, line 21).

By comparison, cow no. 19 ate plaintiff's 14% dairy feed and had a very abnormal and erratic production curve (Ab. 158).

The recent case of Utah Cooperative Association v. Egbert-Haderlie Hog Farmer, Inc., 550 P.2d 196 (Utah 1976), is supportive of defendant's contention that issues in this case were properly submitted to the jury. In the Utah Cooperative case, suit on an open account was brought to recover for the sale of livestock feed. The buyer counterclaimed alleging that the feed was contaminated. After a trial on the issues raised by the counterclaim, the trial court directed a verdict in favor of the seller, and the buyer appealed. The Utah Supreme Court reversed the order of the trial court directing a verdict and remanded the case for a new trial. This court held the case should have been submitted to the jury and, in so ruling, held:

> It is not necessary that the defendant show absolute certainty that the source of infection among the hogs arose from the ingredients supplied by the plaintiff, but it is sufficient if there is substantial evidence to support the likelihood that the infection came from that source. We are of the opinion that in this case there were circumstances shown in the evidence from which a jury could reasonably find that the contamination contained in the feed came from the components furnished by the plaintiff or that the contamination was a result of plaintiff's preparation of the feed and that contamination resulted from the process. (p. 198)

POINT VIII: THIS COURT FAILED TO CORRECTLY STATE THE LAW CONCERNING WHETHER THE VIOLATION OF A STATUTE CONSTITUTES NEGLIGENCE, PER SE

In this case, this court decided that the trial judge committed prejudical error by giving jury instructions 16 and 17, which read in full as follows:

INSTRUCTION NO. 16

Section 4-18-18 of the Utah Code Annotated (1953) states as follows:

> Misbranded feed -- No person shall distribute misbranded feed. A commerical feed shall be deemed to be misbranded: If its labeling is false or misleading in any particular.

If you find from a preponderance of the evidence that plaintiff misbranded its feed sold to the defendant in violation of the statute just read to you, which is proposed for the safety of defendant and others who own dairy cows, such conduct constituted negligence as a matter of law.

INSTRUCTION NO. 17

Section 4-18-17 of the Utah Code Annotated (1953) reads as follows:

> Adulterated feed -- No person shall distribute an adulterated feed. A commerical feed or custom mix feed shall be deemed to be adulterated:
>
> 1. If any poisonous, deleterious, or non-nutritive ingredient has been added in sufficient amount to render it injurious to health when fed in accordance with directions for use on the label.
>
> 2. If any valuable constituent has been in whole or part omitted or abstracted therefrom or any less valuable substance substituted therefor.
>
> 3. If its composition of quality falls below or differs from that which it is purported or is represented to possess by its labeling.
>
> 4. If it contains added hulls, screenings, straw, cobs, or other high fiber material unless the name of each such material is stated on the label.

> If you find from a preponderance of the evidence that the plaintiff manufactured and sold feed to the defendant in violation of the statute just read to you, which is proposed for the safety of defendant and others who own dairy cows, such conduct constitutes negligence as a matter of law.

This assignment of prejudicial error constitutes a failure of this court to correctly state the law as it exists today.

Research of Utah cases on this point shows the general rule to be that a violation of a statute constitutes negligence as a matter of law if the standard of care is fixed by law and the ordinance has reference to the safety of life, limb, or property. Smith v. Mine and Smelter Supply, 32 Utah 21, 88 Pac. 683 (1907). The pivotal point as to whether the general rule applies in a particular case is whether any justification exists for violating the statute.

In the case of White v. Shipley, 48 Utah 496, 160 Pac. 441 (1916), the defendant's team had run into the plaintiff while the defendant was driving on the left of the center of the street. The Supreme Court held that where there was excavation on the right side of the street, defendant was justified in traveling on the left, and the instruction that violation of a statute constituted negligence, per se, was reversible error. In so holding, the court stated that whether a violation of a statute or ordinance constitutes negligence, per se, depends upon the facts and circumstances of the case and in general is a question of

fact, not of law, indicating that the question of whether the defendant was justified in its conduct was a question for the jury.

In the case of North v. Cartwright, 119 Utah 516, 229 P..2d 871 (1951), the Utah Session Laws of 1949 provided that a person operating a motorcycle shall ride only upon the permanent and regular seat attached thereto and shall not carry any other persons. In that case, the plaintiff had a person riding behind him even though the motorcycle was not designed to carry two people. The court held that this violation of the statute designed to protect life, limb, or property constituted negligence as a matter of law. In that case, the plaintiff produced no evidence to show he was justified in violating the statute, and the court ruled that a jury instruction stating that violation of the ordinance constituted negligence as a matter of law was a proper instruction.

In the case of Skerl v. Willow Creek Coal Company, 92 Utah 474, 69 P.2d 502 (1937), the jury found the defendant negligent in storing more than the specified amount of powder in a mine. The trial court instructed the jury that the defendant would be guilty of negligence if it kept or stored gunpowder in its mine in violation of law. The defendant presented no justification for storing more than the specified amount of powder in the mine, and the court

ruled that the instruction that a violation of an ordinance is negligence, per se, was properly given by the trial court.

The case of Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62 (1964), addresses itself to this point. In that case, a garbage truck was stopped on a steep grade on "I" street between 12th and 13th avenues, Salt Lake City. Plaintiff set the brakes, got out, and went to the rear of the truck to talk to a co-worker. The cab door was left open, the key was in the ignition, and the motor was left running. While plaintiff was at the rear of the truck, he heard "something snap" underneath the truck, the brake gave way, and the truck started to roll forward. While trying to jump in the rolling truck, plaintiff was injured, and he sued Ford Motor Co.

The trial court granted defendant's motion for summary judgment on the ground that plaintiff was contributarily negligent by violating §41-6-105, Utah Code Annotated (1953), which required an unattended vehicle to have its engine stopped, ignition locked, and the key removed. With justification the pivotal point, this court reversed the summary judgment granted by the trial court and remanded the case for trial on the ground that while violation of a standard of safety set by statute or ordinance is to be regarded as prima facia evidence of negligence, it is subject

to justification or excuse if the evidence is such that it reasonably could be found that the conduct was nevertheless within the standard of reasonable care under the circumstances. In so holding, this court cited, with approval, Alarid v. Vanier, 50 Cal. 2d 617, 327 P.2d 897 (1958), which states:

> The presumption of negligence which arises from the violation of a statute is rebuttable and may be overcome by evidence of justification or excuse.

In the instant case, the general rule is applicable, and the jury instructions given were proper because plaintiff produced no evidence whatsoever to show any justification or excuse for violating §4-18-18 or §4-18-17 of the Utah Code Annotated (1953). Plaintiff's only position throughout these proceedings has been that it did nothing wrong.

Defendant produced chemical analysis of food produced by plaintiff and the testimony of plaintiff's employees to show that plaintiff's feed was adulterated because its composition of quality fell below or differed from that which it proported or represented to possess by its label.

At page 371 of the transcript, beginning at line 27, the following transpired with questions by defendant's counsel and answers by Mr. Olafsson, the employee in charge of plaintiff's feed formulation:

Q. Now, on that particular one, Exhibit 4, an analysis was run of 32% cattle supplement, is that correct?

A. That's correct.

Q. Would you please tell the jury what the guarantee on the label shows the crude protein to be?

A. 32%.

Q. Would you please tell the jury what the findings of the State Chemist was relative to that sample?

A. 37.4.

Q. All right. Now, that is 5.4% more protein than is shown on the label, correct?

A. Correct.

Q. Would you go down the next column, which is protein equivalent derived from non-protein nitrogen, commonly referred to as urea, is that correct?

A. Correct.

Q. And what does the guarantee state?

A. 20%.

Q. And what did the State Chemist find?

A. 22.4.

Q. So that was 2.4% more urea in that sample than the guarantee showed, is that correct?

A. That's correct.

Q. And what is the date of that test?

A. May 7.

Q. Of what year?

A. 1971. . . .

Q. All right. In order for a sample to be 2.4% excess urea, the only way that could possibly have happened would be for the mixer who prepared that cattle supplement to have not properly followed your formula, isn't that true, Mr. Olafsson?

A. It looks that way, I don't know.

Q. Well, you were in charge of the formulas at the time?

A. But not with the mixing.

Q. But not the mixing, correct?

A. Right.

Q. But the only way that the mixing procedure could vary from your formula would be if the man made a mistake, isn't that correct?

A. It looks to me like that.

At page 376 of the transcript, beginning at line 18, the following transpired:

Q. All right. Thank you. And I'll hand you 12-D and is that a report of analysis on a product of Intermountain Farmers Association?

A. Correct.

Q. And would you please tell the jury what product is involved?

A. Fourteen percent dairy feed.

Q. What is the guarantee on fourteen percent dairy feed?

A. Fourteen percent.

Q. Protein, right?

A. Right.

Q. What does the State find that sample to have?

A. Twenty and a half percent.

Q. What was the guarantee on urea?

A. Four percent.

Q. What did the State Chemist find?

A. Nine percent.

Q. So there is a five percent increase in urea in that sample over and above what the guarantee label showed, correct?

A. Correct.

Q. Isn't it true, that the only way that could have occured would be for that mixer to have made a mistake when he weighed urea?

A. Looks that way.

Q. Or he just didn't even follow your formula, isn't that correct?

A. I would doubt that very much.

Q. You doubt that he disregarded your formula?

A. Right.

Q. But you don't doubt that he made a mistake when he weighed the urea?

A. Can't answer you on that; looks that way.

Q. It looks that way?

A. Yeah.

Q. As a matter of fact, the reason that you gave, well let me say it this way; isn't it true that your opinion on that subject is

that the difference is simply human error by the mixer?

A. Looks that way.

Q. All right. And I'll hand you Exhibit 13; would you please tell the Jury what that sample is of?

A. Fourteen percent dairy.

Q. That means that the label is guaranteeing fourteen percent, right?

A. Right.

Q. What does the State Chemist find?

A. 25.3 percent.

Q. Was the urea content guaranteed at four percent?

A. Correct.

Q. And what did the State Chemist find?

A. 12.4.

Q. 8.4 percent more urea than the label showed, is that correct?

A. Right.

At page 381 of the transcript, beginning at line 17, the following transpired:

Q. And that sample that I have just shown you, which is Exhibit 13, clearly shows more urea than is proper, isn't that correct?

A. Uh-hum, yes.

Q. And isn't it true that Exhibit 12 also shows excess urea over and above what is proper in a feed?

A. Yes.

At page 389 of the transcript, beginning at line 8, the following transpired:

Q. And I'll hand you 15? . . .

MR. BLONQUIST: Q. What is that a sample of?

A. 32 percent cattle supplement.

Q. And what's the guarantee?

A. 32 percent.

Q. What is it found to have?

A. Forty-eight and a half.

Q. Somebody made a mistake on that one, didn't they, Mr. Olafsson?

A. Yes.

Q. And the State Chemist said so, didn't he?

A. Right.

Q. What did he say?

A. He says, "The above sample is found to contain in excess of protein equivalent derived from non-protein nitrogen."

Q. What was the guarantee of urea in that sample?

A. Twenty percent.

Q. What was found?

A. 29.

Q. 29 percent in excess, correct?

A. Uh-hum.

Q. Someone made a mistake on that one?

A. Yes.

Q. Either didn't follow your formula, did he?

A. Probably so.

Q. Probably so? You mean he didn't follow it?

A. Correct.

These excerpts from the transcript clearly show that plaintiff negligently produced feed, and at no place in the transcript of these proceedings is there any evidence whatsoever presented by the plaintiff to show that its failure to abide by the statutes was justified or excusable.

For the foregoing reasons, no error was made by the trial court in giving jury instructions 16 and 17.

POINT IX: THIS COURT FAILED TO CORRECTLY STATE THE LAW CONCERNING RULE 70 OF THE UTAH RULES OF EVIDENCE

During the course of the trial, more than 140 exhibits were introduced in evidence by defendant in support of his counterclaim. Most of these exhibits consist of many pages. Exhibit 19 comprises over 300 individual cow records. Exhibits 17 through 54 each comprised five worksheets showing the test day, test run, and results, a one-sheet computer printout known as the Herd Summary and a three-page computer printout entitled "Dairy Herd Improvement Records." In addition to these exhibits, defendant brought to the trial a large cardboard box containing milk receipts from Beatrice Foods-Meadow Gold Dairy and a large folder containing his tax returns.

In an effort to shorten the presentation of evidence, defendant prepared summaries (Exhibits 139, 146, 138, 163, and 162) and graphs (Exhibits 165, 166, 144, 143, 142, 140, and 141).

Of all of these summaries and graphs, only one (Exhibit 166) was received in evidence. The offer of the other exhibits was refused on the ground that they represented evidence already admitted and constituted merely another way of presenting the same evidence.

Defendant contends that all of the summaries, graphs, and charts should have been received in evidence, and plaintiff has nothing to complain about by the court allowing defendant to refer to and read from Exhibits 162, 163, 138, 146, and 139.

The Montana Supreme Court in the case of McCollum v. O'Neil, 128 Mont. 584, 281 P.2d 493 (1955), held that when documents are voluminous and made up of very detailed statements, the use of a summary is proper and that no reversible error was committed by the trial court in admitting the summaries in evidence. The court went on to say:

> This method of getting before the jury the result of the examination of books of account and records is to be commended (p. 497).

This subject is treated in IV Wigmore on Evidence, Third Ed. §1230, p. 434. The rule is stated as follows:

> Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements--as, the net balance resulting from a year's vouchers of a treasurer of a year's accounts in a bank ledger--it is obvious that it would often be practically out of the question to apply the present principle of requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered in the shape of the testimony of a competent witness who perused the entire mass and will state summarily the net result. Such a practice is well established to be proper.
>
> Most Courts require, as a condition, that the mass thus summarily testified to shall, if the occasion seems to require it, be placed at hand in court, or at least be made accessible to the opposing party, in order that the correctness of the evidence may be tested by inspection if desired, or that the material for cross-examination may be available. (Emphasis added.)

The Utah Supreme Court showed its concurence with Wigmore and the Montana Supreme Court on this subject in its decision in Sprague v. Boyles Bros. Drilling Co., 4 Utah 2d 355, 294 P.2d 689 (1956). In that case an action was brought by a general contractor against the subcontractor for breach of contract by which the subcontractor agreed to break rocks into proper size for use by the general contractor. On appeal, the subcontractor claimed that the trial court erred in receiving work sheets containing a compilation and computation of figures and computation of expenses incurred by the general contractor when the subcontractor pulled off the job. In ruling that the trial court did not commit error in overruling the objection and receiving the evidence, the court said:

> It has been held, and we believe the ruling to be a salutary and expedient one, that where original book entries, documents, or other data are so numerous, complex, or cumbersome that they cannot be conveniently examined by the fact trier, or where it would materially aid the court and the parties in analyzing such material, that a competent person who has made such examination may present such evidence. This is subject to the limitation that the evidence must be shown to be developed from records, books, or documents, the competency of which has been established, and the records must be available for examination by the opposing parties and the witness subject to cross-examination concerning such evidence. The evidence here presented conformed to the above requirements. Mrs. Sprague testified to the manner of keeping the books; she explained the exhibits and the underlying data, consisting of payroll records, invoices, vouchers, and cancelled checks, all of which were present in court for inspection and she was there for cross-examination with respect to all of such matters. The trial court did not commit error in overruling the objection and receiving the evidence.

In the instant case, defendant was present in court and was cross-examined by counsel for plaintiff. All records referred to were in court and were made available to defendant (Tr. 1051, Ab. 148).

Fully supportive of this position is Rule 70(1)(f) and (2) of the Utah Rules of Evidence.

Plaintiff has no grounds to complain because defendant referred to and read from summaries. The summaries themselves were not allowed in evidence, and the jurors only took into the jury room those portions of the summaries that they recalled from defendant's testimony. It would have been far better for defendant's case had the summaries been

allowed in evidence to be read, considered, and used by the jurors in their deliberations as to the amount of defendant's damages.

In addition to the foregoing, the record clearly shows that at trial plaintiff did not object to defendant referring to and reading from the summaries (Tr. 1042 L. 20 through Tr. 1047 L. 13; Tr. 1158 L. 15 through Tr. 1167 L. 7; Tr. 1157 L. 15 through Tr. 1158 L. 14; Tr. 1157 L. 15 through Tr. 1071 L. 9; Tr. 1074 L. 14 through 1076 L. 3; Tr. 1050 L. 14 through Tr. 1053 L. 27).

In its brief, plaintiff refers to an objection made at Tr. 1083, Ab. 157. The record clearly shows that a discussion took place between the trial judge and defendant's counsel. At no time did plaintiff's counsel record an objection.

Assuming arguendo that this evidence was improper (the authorities hereinabove cited clearly show the evidence was properly allowed), it is clear under Utah law that a verdict or finding shall not be set aside nor shall the judgment or decision based thereon be reversed "by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection . . ." Rule 4, Utah Rules of Evidence.

This court has repeatedly held that when a party does not raise objections below when he had notice and opportunity to object, he may not be heard to complain for the first time on appeal. Huber v. Newman, 106 Utah 363, 145 P.2d 780 (1944).

POINT X: THE COURT MISUNDERSTOOD RULINGS OF THE TRIAL COURT CONCERNING THE ADMISSIBILITY OF REPORTS OF ANALYSIS

Throughout the period material to this case, the Utah State Department of Agriculture, Office of State Chemist, performed chemical analyses of feed samples taken from plaintiff's plants and issued reports thereon to ensure compliance with commercial feed laws and regulations of the State of Utah. Tests by the State Chemist were performed to see that the feed contained the content guaranteed by the plaintiff and other feed manufacturers (Ab. 5).

Each report bears two dates, the date the report was prepared, which was placed in the upper right hand corner on the date line, and the date the same was taken at the plant, which was shown opposite the plant location. On Exhibit 2, for example, the report was prepared on November 11, 1971, and the feed sample was taken on September 29, 1971.

Each report of analysis also sets forth in the guarantee column those percentages guaranteed by the label on the feed and, opposite therefrom, the percentages found

by the Office of the State Chemist after the chemical analysis is complete.

Copies of the reports were furnished to management of plaintiff (Ab. 5). They were received by Mr. Olafsson, who was in charge of plaintiff's feed formulations (Ab. 26).

The reports of analysis on 14% dairy feed, 32% dairy concentrate pellets, and 32% cattle supplement clearly show that plaintiff produced feed for dairy animals containing inconsistent quantities of crude protein and inconsistent quantities of urea as well as excessive urea sufficient to cause symptoms in dairy animals observed by defendant, Edward Aragon, Dr. Roper, Dallas Shermer, Harvey Cook, and Curtis Solomon and sufficient excessive amounts of urea to cause the decrease in milk production as testified by defendant and as shown on his DHIA records.

These exhibits were introduced in evidence by defendant on the question of whether or not plaintiff negligently manufactured and distributed dairy feed during the time defendant purchased feed from plaintiff and on the question of whether or not plaintiff's conduct was willful.

Reports covering feed manufactured by plaintiff prior to the time defendant purchased plaintiff's feed (defendant's first purchase was in February of 1971) were received in evidence to show that plaintiff was on notice

that its feed did not meet the guarantee on the label. On this point, defendant produced the following evidence:

A. Plaintiff's employees knew that inconsistent protein in dairy feed was harmful to dairy animals (Ab. 78).

B. Plaintiff's employees knew that feed for dairy cows should not contain diethylstilbestrol (Ab. 29).

C. Plaintiff received reports of analysis from the Utah State Chemist (Ab. 126).

D. Reports received by plaintiff prior to the first time defendant used plaintiff's 14% dairy feed showed that the 32% cattle supplement pellets used at the Spanish Fork plant as an ingredient in 14% dairy feed contained diethylstilbestrol. Exhibit 14 (No. 70-7208).

E. Reports received by plaintiff prior to the first time defendant used plaintiff's 14% dairy feed showed that plaintiff's feed contained inconsistent protein and excess urea. Exhibit 149 (No. 70-5204), 149 (No. 70-6721), and 149 (No. 70-7280).

F. No changes were made by plaintiff to improve the consistency of its feed (Ab. 74).

Defendant's evidence clearly shows that prior to the use by defendant of plaintiff's 14% dairy feed, plaintiff had knowledge that its feed contained diethylstilbestrol, excess urea, and was inconsistent in protein, yet no quality controls were thereafter implemented by plaintiff. This

evidence increases the probability that plaintiff's feed contained diethylstilbestrol and excess urea and was inconsistent in protein during periods of use by defendant. On this basis, reports of analysis on samples taken prior to February of 1971 were clearly admissible.

This position is supported by the Utah Supreme Court in the case of Fowler v. Medical Arts Building, 112 Utah 367, 188 P.2d 711 (1948). In that case, a small boy was killed in an accident on an elevator of the Medical Arts Building. A jury awarded plaintiff a substantial verdict, and the defendant appealed. At trial, the mother of the deceased boy testified that when they got on the elevator it started with a jerk, causing the small boy to lose his balance, fall, get caught in the elevator shaft, and die. The plaintiff called two witnesses, who each testified about riding on the elevator on which the small boy was killed within a week prior to the accident and that on such occasion the elevator, being operated by an employee of defendant, stopped and started with a jerk.

The defendant argued on appeal that testimony of these two witnesses was not admissible evidence and that the receipt thereof was reversible error. Defendant cited cases to the effect that evidence of negligence on one occasion may not be proven by showing similar acts of negligence on

previous occasions. In ruling that no error was committed by the trial court, the Supreme Court wrote:

> ...One of plaintiff's witnesses testified of an incident within a week of the accident and the other testified of an incident which occured on the Tuesday prior to the accident, which occured on Friday. Defendant's evidence showed that no repairs had been made in the meantime . . . The fact that it started with a jerk on these previous occasions and that no repairs were made in the meantime increases the probability that it so started at the time of this accident . . . This evidence was clearly admissible to show that the corporate defendant had knowledge through its employees, the operators of the elevators on those occasions, that the elevator was out of repair (p. 713).

Reports on both 32% cattle supplement pellets and 32% dairy concentrate pellets were properly admitted into evidence because testimony was produced to show that in mixing 14% dairy feed, plaintiff's Spanish Fork plant used 32% dairy concentrate pellets when it ran short of 32% cattle supplement pellets (Ab. 44).

Reports on feed manufactured by plaintiff after defendant stopped using plaintiff's feed were received in evidence on the issue of whether or not plaintiff's conduct was willful.

An element in determining willful and wanton conduct is whether or not the person charged had prior notice of this unlawful conduct. Based upon this sound legal principle, the trial court properly received in evidence reports of analysis prepared by the Department of Agriculture,

Office of the State Chemist, on 14% dairy feed, 32% cattle supplement pellets, and 32% dairy concentrate pellets manufactured by plaintiff after the periods of use by defendant.

On this point, the Supreme Court of Oregon held that in order to charge one with willful and wanton conduct under the circumstances, it must be shown that he had actual knowledge of the present or impending danger to the person injured. Falls v. Mortensen, 207 Ore. 130, 295 P.2d 182 (1955). Likewise, the Washington State Supreme Court held that to be guilty of willful and wanton misconduct the person charged therewith must have had knowledge, or its equivalent, of the danger and probable injury. Adkisson v. City of Seattle, 42 Wash. 2d 676, 258 P.2d 461 (1953).

The record clearly indicates the consistency of the rulings by the trial court. While reports of analysis were received in evidence for all periods, the court refused to allow defendant's expert, Dr. Robert Gardner, to give an opinion as to the toxic effects of the urea content or the effect on defendant's dairy animals of feed containing inconsistent amounts of protein unless the report of analysis showed a feed sampling date during periods of use by defendant of plaintiff's 14% dairy feed (Tr. 710 and 711).

As an example, the trial court would not allow Dr. Gardner to testify relative to the toxic effects of the 14% dairy feed tested by the State Chemist on August 15, 1974

(Exhibit 12), because defendant ceased buying feed from plaintiff in July of 1974 (Tr. 710 and 711).

No confusion existed by allowing these exhibits in evidence because each exhibit clearly showed the date the sample was taken. This allowed jurors to easily ascertain whether that sample was taken during a period of use by defendant of plaintiff's 14% dairy feed. The reports clearly identify the feed or supplement tested and show from which plant the sample was taken. Each report bears the date it was issued by the Utah State Chemist.

CONCLUSION

Based upon the foregoing points, it is respectfully submitted that adequate and sufficient grounds exist for this court to grant defendant a rehearing so that a proper ruling in this case can be made by the court.

Respectfully submitted,

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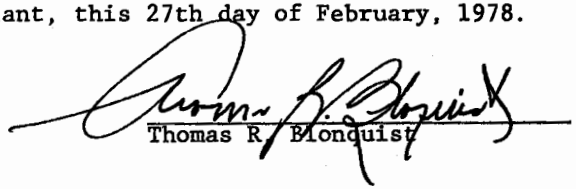
Dated: February 27, 1978

DELIVERY CERTIFICATE

The undersigned certifies that three copies, one copy each, of the foregoing brief of respondent were delivered to J. Thomas Greene, Dorothy C. Pleshe, and DeLyle H. Condie, attorneys for appellant, this 27th day of February, 1978.



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